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RECENT INTERPRETATION OF THE SHERMAN ACT.*

THE only legitimate end and object of all government is the greatest good of the greatest number of the people. The means by which this end is attained vary in accordance with the experience and the temperament of the people. Government is necessarily more or less of an experiment at all times, but as men have been making similar experiments ever since the dawn of recorded history, the waste of repeating unsuccessful experiments of the past may be avoided by studying the records of the results of earlier effort; and, other things being equal, all thoughtful persons will agree, that the probabilities of success will be greater if action be taken along lines which in the past, under similar conditions, have been attended with resulting benefit to the common weal. All history demonstrates the fact that the greatest prosperity to the state has resulted from allowing to individual effort in trade and commerce the utmost freedom consistent with the protection of society at large.

Yet the experience of the remote as well as of the recent past demonstrates the necessity of some governmental regulation of private enterprise, in order that the fruits of industry may not be entirely garnered into a few hands, and that the freedom of individual effort may not be unduly restrained.

We need look no further than to the history of England, from which we derive most of our conceptions of civil liberty, for evidence of the character of evils affecting trade and commerce which commercial prosperity tends to develop, and of the methods which have proved most effective in restricting those evils.

The first statute enacted in England in 1436 against agreements in restraint of trade[1] was directed against regulations made by persons in confederacy "for their singular profit, and common

* An address delivered before the Michigan State Bar Association, July 6, 1911.

[1] 15 Henry VI, re-enacted 1503, 19 Henry VI, c. 7.

damage to the people." Note that even at that early date the action of the legislature was directed at curbing the selfish exercise of power by a few for their own benefit, but to the common damage of the people.

The considerations upon which contracts in restraint of trade were held void at common law, as our Supreme Court has often pointed out, were (1) the injury to the public by being deprived of the restricted party's industry; and (2) the injury to the party himself by being precluded from pursuing his occupation, thus tending to make him more or less of a public charge.[2] In the case of a corporation chartered by a State to carry on a particular business, any agreement entered into voluntarily by it which impaired or restricted in any material degree its power to discharge the functions conferred upon it by the State, was necessarily contrary to the public policy and void.[3]

Monopolies in trade have been at all times, under all forms of government, regarded as obnoxious to the general welfare. They were early declared to be contrary to the law of England; and the outburst of popular resentment to the grant by Queen Elizabeth to certain of her favorites of the exclusive right of dealing in particular commodities, compelled even that powerful monarch to disclaim any intention to offend against the popular sense of right and justice of her subjects, and to blame her advisers for the acts which she formally disavowed:

> "There are no Patents now of force," declared Cecil, speaking to the House of Commons concerning the various grants of Monopoly, "which shall not presently be revoked; for what Patent soever is granted there shall be left to the overthrow of that Patent, a Liberty agreeable to the Law. There is no Patent, if it be *Malum in se,* but the Queen was ill apprized in her grant. But all to the generality be unacceptable. I take it, there is no Patent whereof the Execution hath not been injurious. Would that they had never been granted. I hope there shall never be more. (All the House said Amen.)"[4]

The vice of monopoly was recognized in England to be the power acquired by the monopolist to control prices by excluding competition. With the tremendous development of the marvelous natural resources of a new country, and the unprecedented powers conferred

[2]Gibbs v. Baltimore Gas Co., 130 U. S. 396, 409.
[3]People v. N. River Sugar Ref. Co., 54 Hun, 354.
[4]D'Ewes Journal of the Parliaments of Elizabeth, p. 652.

by State legislation throughout the United States upon associations of individuals under corporate form, the opportunity and the machinery for the centralization of control over great industries proved so tempting to cupidity, that twenty odd years ago, even so busy, self-satisfied a people as the prosperous citizens of these United States were aroused to the necessity of checking the rapid tendency to the concentration of control of great industries into a few hands. While the State courts and legislatures attempted to deal with the subject, it was soon recognized that only the national government could adequately grapple with an evil which had become national in its extent. The simple but unlimited power vested in Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes," furnished the general government with sufficient jurisdiction to protect the commerce of the nation from undue restraints and monopolization.

So the act of July 2, 1890, was passed, declaring in terms so comprehensive, yet so simple that it has required two decades of judicial exposition to bring their meaning home to the people with living force, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce among the States, or with foreign nations," is illegal, and that every person who shall monopolize or attempt to monopolize any part of such trade or commerce, is guilty of a misdemeanor; and that the United States Circuit Courts sitting in equity shall have jurisdiction, at the suit of the United States, to prevent and restrain all violations of the act. Very slowly indeed has a full consciousness of the meaning of this law come over the intelligence of the American people. The first effort to apply it, in the *Knight* case,[5] proved abortive, partly because of an imperfect recognition of the remedies which should have been sought; partly because of a too narrow conception of the extent of Congressional power over interstate commerce.

It was then successfully directed in the *Trans-Missouri*[6] and the *Joint Traffic Association*[7] cases against agreements between interstate railroads made to control rates of interstate transportation; but an extreme statement of the meaning of the phrase "restraint of trade" enunciated in the opinions of the court in those cases, became the basis of a school of literal interpretation which seemed bent upon reducing the law to an absurdity and thus creating a public sentiment which would make impossible its enforcement. Yet the

[5] 156 U. S. 1.
[6] 166 U. S. 290.
[7] 171 U. S. 506.

author of these opinions in the second of them rejected with some sarcasm the interpretation sought to be placed upon his language in the earlier one. Observing at the outset that no contract of the nature described by counsel as those which he suggested would be invalidated by the application of the meaning given by the court to the words of the act, was before the court in the case under consideration, and that there was, therefore, some embarrassment in assuming to decide just how far the act might go in the direction claimed, Justice PECKHAM said:

> "Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of a contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant, of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri* case[6] as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business."

In the *Addyston Pipe* case[8] it was held that the act operated to invalidate an agreement between members of an association of corporate manufacturers of iron pipe, made for the purpose of controlling prices by suppressing competition among themselves. *Montague* v. *Lowry*[9] was to the same effect.

In the *Northern Securities* case,[9a] it was held that control of two competing lines of interstate railway could not be acquired by vesting a majority of the stock of each in a corporation organized under the laws of New Jersey, without violating the act. In the *Swift* case[10] a combination between competitors in the business of buying

[8] 175 U. S. 227.
[9] 193 U. S. 38.
[9a] 193 U. S. 334.
[10] 196 U. S. 375.

and shipping live stock and converting it into fresh meats for human consumption, suppressing bidding against each other, and arbitrarily, from time to time, raising, lowering and fixing prices, and combining to make uniform charges to the public, was also held within the prohibition of the statute.

In the *Danbury Hat* case[11] a combination of individuals to prevent defendants (manufacturers of hats) from manufacturing and shipping hats in interstate commerce, was condemned; and in the *Continental Wallpaper* case[12] a combination of manufacturers of wall paper, fixing prices and providing against sales except under agreements between members of the combination, was held to violate the law.

In the meantime, certain of the decisions had drawn a line of differentiation, by holding that the act was not intended to affect contracts which have only a remote and indirect bearing upon commerce between the States,[13] and that a covenant by the vendor of an interstate business to protect the purchaser from competition for a reasonable period, made as a part of the sale of the business and not as a device to control commerce, was neither within the letter nor the spirit of the act.[14]

While the intent of parties entering into a particular agreement or combination, etc., was held to be immaterial where the necessary inference from the facts that the direct and necessary result of the agreement was to restrain trade, yet in the *Swift* case, Justice HOLMES pointed out that intent was almost essential to a combination in restraint of commerce among the States, and was essential to an attempt to monopolize the same.

> "Where acts are not sufficient in themselves to produce a result which the law seeks to give them—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen * * * . But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."[15]

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[11]Loewe v. Lawler, 218 U. S. 274.

[12]212 U. S. 227.

[13]Field v. Barber Asphalt Co., 194 U. S. 618; Hopkins v. United States, 171 U. S. 578.

[14]Cincinnati Packet Co. v. Bay, 200 U. S. 179.

[15]Swift & Co. v. United States, 196 U. S. 396.

The proceeding against the American Tobacco combination brought before the court for the first time the question of the full interpretation of the statute in its application to attempts to monopolize, and in deciding the case in the Circuit Court, Judge LACOMBE expressed the extreme view of the school of literal interpretation by asserting that the act prohibited every contract which to any extent operated to restrain competition in interstate commerce.

> "Size," he said, "is not made the test: Two individuals who have been driving rival express wagons between villages in contiguous States, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not."[16]

On the other hand, Circuit Judge Hook in the *Standard Oil* case[15a] decided in the Eighth Circuit after the decision in the *Tobacco* case, said:

> "The construction of the act should not be so narrow or technical as to belittle the work of Congress, but on the contrary it should accord with the great importance of the subject of the legislation and the broad lines upon which the act was framed. The language employed in the act is as comprehensive as the power of Congress in the premises, and the purpose was not to hamper business fairly conducted, but adequately to promote the common interest in freedom of competition and to remove improper obstacles from the channels of commerce that all may enter and enjoy them. The wisdom of the law lies in its spirit as well as in its letter, and unless they go together in its construction and application justice goes astray."

Speaking of the application of the second section of the act, he added that the modern doctrine with respect to monopoly "is but a recognition of the obvious truth that what a government should not grant, because injurious to public welfare, the individual should not be allowed to secure and hold by wrongful means."

This being the state of the law, the four decisions involving a construction of the act rendered by the Supreme Court during the term just closed, are of especial interest. The first case decided came up on writ of error, brought by the United States to reverse a judgment of the Circuit Court in New York sustaining pleas in

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[15a] 218 U. S. 681.

[16] 164 Fed. 702.

bar to an indictment for conspiracy to restrain interstate commerce in violation of the first section of the act.[17] The facts stated in the plea showed that the conspiracy had been originally entered into more than three years before the finding of the indictment. The Circuit Court had held that the crime was completed as soon as the conspiracy was formed. But the indictment charged a continuing conspiracy to eliminate competition. The court said:

> "A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success."

The facts set forth in the indictment as the means by which the alleged purpose was to be accomplished showed that the acts committed by the defendants were for the purpose of preventing a competing company from engaging in business; that this prevention continued and could only be terminated by the affirmative act of the defendants, which act had not been performed. The plea was therefore held bad.

> "A conspiracy in restraint of trade," said Mr. Justice HOLMES, "is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself; just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act. * * * *"

The next case decided was that of *Dr. Miles Medical Company* v. *John D. Park & Sons Company*.[17a] That was a suit in equity brought by a manufacturer of proprietary medicines prepared in accordance with secret formulæ, to prevent dealings in them by third parties in violation of a system of contracts with its purchasers, denominated as agents (wholesale distributing agents and retail distributing

[17] U. S. v. Kissel, 218 U. S. 601.

[17a] 220 U. S. 373

agents) to maintain certain prices fixed by it for all sales of its products at wholesale or retail. The court held that the evidence showed that complainant had created—

> "a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition."

The court quoted the description of the essential features of the system given by Mr. Justice LURTON in his opinion in the Circuit Court of Appeals, as follows:

> "The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complaint's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers and the retailers to maintain prices and stifle competition has been brought about."

That these agreements restrained trade the court held to be obvious. That, having been made, as the bill alleged, with most of the jobbers and wholesale druggists and a majority of the retail druggists of the country, and having for their purpose the control of the entire trade, they related directly to interstate as well as intrastate trade, and operated to restrain commerce among the several States, was also stated to be clear. The court analyzed and dismissed the contention that the restraints were valid because they related to proprietary medicines manufactured under a secret process. It further held that a manufacturer cannot by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales. Reference was made in this regard to the decision by the Supreme Court in the

case of *Bobbs-Merrill Co.* v. *Strauss*[18] that no such privilege exists under the copyright statutes, although the owner of a copyright has the sole right to vend copies of the copyright production, and it was said that the manufacturer of an article of commerce not protected by any statutory grant was not in any better case. The agreements in the case at bar were obviously designed to maintain prices after the complainant had parted with title to the articles, and to prevent competition among those who traded in them, and for that reason they were held to be void. The court cited a long line of cases by which it had been adjudged that agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interests and void.

> "They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer * * *. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."[19]

Following these two cases, the Supreme Court next addressed itself to the decision of the case of the two great monopolistic combinations—the Standard Oil and the American Tobacco.

In the *Standard Oil* case[19a] the Supreme Court affirmed a decree of the Circuit Court which adjudged that the individual and corporate defendants had entered into and were carrying out a combination or conspiracy in restraint of interstate and foreign commerce in petroleum and its products, such as was prohibited by the first section of the act; and that by means of this combination those defendants had combined and conspired to monopolize, had monopolized and were continuing to monopolize a substantial part of the commerce among the States, in the Territories and with foreign nations, in violation of Section 2 of the act.

This conclusion was based on the following considerations, viz.:

1. "Because the unification of power and control over

[18] 210 U. S. 339.
[19] 220 U. S. 373, 408.
[19a] 218 U. S. 681.

petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce."

2. Because this *prima facie* presumption was made conclusive by considering the conduct of the persons and corporations who were mainly instrumental in bringing about the acquisition by the New Jersey corporation of the stocks of the large number of corporations which it acquired, as well as the modes in which the power vested in the New Jersey corporation had been exerted and the results which had arisen from it.

The acts of the defendants preceding the transfers to the New Jersey company of the shares of stock of a large number of other corporations were held by the court to evidence—

> "an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view."

Confirmation of the finding of the continuous intent in the defendants to exclude others from the field and themselves to dominate it, was found in an examination of the exercise of its power by the combination after it was formed.

> "* * * The acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted

> by which the country was divided into districts and trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

Briefly, therefore, the decision of the court was put upon the ground that the defendant, by vesting in a New Jersey corporation the stocks of a large number of other corporations engaged in various branches of the production, refining, transportation and marketing of petroleum and its products, which but for such control would or might have been engaged in competition with each other in interstate and foreign commerce in those commodities, had acquired the control of that commerce; and that such control was acquired and had been and was exercised with the intent and purpose of maintaining it—not as a result of normal methods of business, but by new means of combination, resorted to in order to secure greater power than would have been acquired by normal methods, and of driving out and excluding, so far as possible, all competitors in the business, thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

It was not alone the acquisition of a large share of commerce among the States and with foreign countries, upon which the court predicated the conclusion of unlawful combination and monopolization, but the attainment of dominion over a substantial part of that commerce by means of intercorporate stock holdings in actually or potentially competing corporations, accompanied by the exclusion of competitors, and attended with continued acts evidencing an intent and purpose to retain controlling power over the business and to exclude and suppress all competition with it.

In reaching the conclusions stated, the CHIEF JUSTICE reviewed the history of the English law on the subject of monopolies and restraints of trade, and held that the Sherman Act "was drawn in the light of the existing practical conception of the law of restraint of trade," and that

> "in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from con-

demnation. The statute, under this view, evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint."

The CHIEF JUSTICE further said that as the act had not defined contracts in restraint of trade, the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced in the statute, was intended to be the measure used for determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided. He rejected the idea that the use of the words "every contract, etc., in restraint of trade" in the statute leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its "prohibitions to every case within its literal language." This, he said, would be to make the statute "destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce." He cited the language of Justice PECKHAM in writing the opinion of the court in *Hopkins* v. *United States*.[20]

"To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act."

And he observed—

"If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide * * *."

A consideration of the text of the second section, he said, serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded.

"In other words, having by the first section forbidden all means of monopolizing trade, that is unduly erstraining it by

[20] 171 U. S. 578, 592.

> means of every contract, combination, etc., the second section seeks if possible, to make the prohibition of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about are not embraced within the enumeration of the first section."[21]

Mr. Justice HARLAN, in a separate opinion, while concurring in the main with the decision of the court, interpreted the majority opinion as amounting to a reading into the statute of the word "unreasonable" before the words "restraint of trade," and vigorously protested that such interpretation was in substance the reversing of the previous deliberate judgments of the court to the effect "that the act interpreting its words in their ordinary acceptation, prohibits *all* restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable."

Two weeks after the decision in the *Standard Oil* case, the court rendered its decision in the case against the Tobacco combination. In his opinion, which was concurred in by all the associate justices but HARLAN, the CHIEF JUSTICE interpreted the opinion in the former case and answered the criticisms of Mr. Justice HARLAN and those who had expressed views as to the meaning of the *Standard Oil* decision similar to his.

"In that case," said the CHIEF JUSTICE, "it was held without departing from any previous decision of the Court that as the statute had not defined the words 'restraint of trade' it became necessary to construe those words, a duty which could only be discharged by a resort to reason." He quoted the language of Justice PECKHAM in the *Joint Traffic* case.[22]

> "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it."

"Applying" said the CHIEF JUSTICE—

> "the rule of reason to the construction of the statute, it was held in the *Standard Oil case* that as the words "restraint of trade," at common law and in the law of this country at the

[21] Hopkins v. U. S., 171 U. S. 578, 592.
[22] 171 U. S. 568.

> time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term 'restraint of trade' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect."[23]

The facts presented in the *Tobacco* case were more intricate and involved than those in the *Standard Oil* case. Not only was the American Tobacco Company the holder of stocks in other companies, but it was itself a consolidated company formed by the merger under the laws of New Jersey of three pre-existing companies. The combination of many previously competing companies was created first by the transfer of shares of stock from one to the other, afterwards cemented by absolute conveyances of land, plants and other property and business. The nucleus of the combination was the original American Tobacco Company, organized in January, 1890, and to which was at once conveyed by deed and transfer the plants and business of five different concerns, competitors in the purchase of the raw product which they manufactured, and in the distribution and sale of the manufactured products. The result of this combination was to give to the new company immediately on its organization a practical monopoly of the cigarette business of the United States, and that accomplishment colored all subsequent proceedings in the widening sweep of the combination, the progress of which was noted by the Supreme Court as being attended with the

[23]U. S. v. American Tobacco Co. et al., 31 Sup. Ct. 632.

constant acquisition of competing concerns, buttressed by covenants on the part of all their officers and principal stockholders not to engage in business in competition with the purchaser; and in the acquisition of many competitors, not for the purpose of continuing their operation, but of closing them down and putting them permanently out of business. A summary of the salient facts dwelt upon by the Court as the basis for its decision was made in this language:

> "Thus, it is beyond dispute: First, that since the organization of the new American Tobacco Company that company has acquired four large tobacco concerns, that restrictive covenants against engaging in the tobacco business were taken from the sellers, and that the plants were not continued in operation but were at once abandoned. Second, that the new company has besides acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled by the American Tobacco Company, although the connection as to two of these companies with that corporation was long and persistently denied.
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> "Thus reaching the end of the second period and coming to the time of the bringing of the suit, brevity prevents us from stopping to portray the difference between the condition in 1890 when the (old) American Tobacco Company was organized by the consolidation of five competing cigarette concerns and that which existed at the commencement of the suit. That situation and the vast power which the principal and accessory corporate defendants and the small number of individuals who own a majority of the common stock of the new American Tobacco Company exert over the marketing of tobacco as a raw product, its manufacture, its marketing when manufactured, and its consequent movement in the channels of interstate commerce, indeed, relatively over foreign commerce, and the commerce of the whole world, in the raw and manufactured products stand out in such bold relief from the undisputed facts which have been stated * * *."[24]

These undisputed facts, the court well said, involved questions as to the operation of the anti-trust law not hitherto presented in any case. They clearly demonstrated that the acts, contracts, agreements, combinations, etc., which were assailed were of such an unusual and wrongful character as to bring them within the prohibitions of the law.

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[24]U. S. v. American Tobacco Co. et al., 31 Sup. Ct. 632.

> "Indeed," said the CHIEF JUSTICE, "the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible."[25]

These conclusions were stated to be inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof showed were united by resort to one device or another, not alone because of the dominion and control over the tobacco trade which actually existed; but because the court was of opinion that the conclusion of wrongful purpose and illegal combination was overwhelmingly established by the following considerations:

1. The fact that the first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to the combination.

2. Because, immediately after that combination, the acts which ensued justified the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure, either by driving competitors out of the business or compelling them to become parties to the combination.

3. By the ever-present manifestation of a conscious wrong-doing by the form in which the various transactions were embodied from the beginning—now the organization of a new company, now the control exerted through taking up stock in one or another or in several, so as to obscure the result actually attained, evidencing a contsant purpose to restrain others and to monopolize and retain power in the hands of the few who, from the beginning, contemplated the mastery of the trade which followed.

4. By the absorption of control of all the elements essential to the manufacture of tobacco and its products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers against others in trade.

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[25]U. S. v. American Tobacco Co. et al., 31 Sup. Ct. 632.

5. By persistent expenditure of large sums in buying out plants, not to utilize but to close up, rendering them useless for the purposes of trade.

6. By the constantly recurring stipulations exacted from manufacturers, stockholders, or employees, binding themselves generally for long periods not to compete in the future.

From all of these acts the court deduced the conclusion that the defendants had been engaged in a largely successful effort, extending over a period of years, to monopolize (that is, wrongfully to acquire to themselves) the dominion over the manufacture and marketing of tobacco and its products and accessories, not by normal methods of business, but by unfair and subtle methods of combination, resorted to in order to secure greater power than they could have acquired by normal methods of business, and with the intention of driving out and excluding so far as possible all other competitors and centralizing in the combination a perpetual control of the movements of tobacco and its products and accessories in the channels of interstate and foreign commerce.

The remedy to be applied in the *Standard Oil* case was comparatively simple and obvious, and the decree of the Circuit Court which, with slight modifications, was affirmed by the Supreme Court, to use the language of that court, "commanded the dissolution of the combination, and therefore, in effect, directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same, of the stock which had been turned over to the New Jersey corporation in exchange for its stock, and enjoined the stockholders of the corporations after the dissolution of the combination from by any device whatever recreating directly or indirectly the illegal combination which the decree dissolved."

A far more intricate problem was presented in the *Tobacco* case, as was frankly recognized by the court. Conveyances, consolidations and mergers, and the dissolution of previously existing corporations whose stocks and properties had been acquired, had so blended the whole combination into new form as to make it impossible to effect a dissolution by the simple method applicable to the *Standard Oil* case, and therefore the Supreme Court said that, in determining the relief proper to be given, it might not model its action upon that granted by the court below, but in order to award relief coterminous with the ultimate redress of the wrongs which the court found to exist, it must approach the subject of relief from an original point of view. In considering the subject from that aspect, the court said that three dominant influences must guide its action:

> "1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons * * * without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."

For the purpose of meeting that situation the court declared that it might at once resort to one or the other of two general remedies:

> "*a*, the allowance of a permanent injunction restraining the combination as a universality and the individuals and corporations which form a part of or co-operate in it in any manner or form from continuing to engage in interstate commerce until the illegal situation be cured * * * ; or, *b*, to direct the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications for the purpose of preventing a continued violation of the law, and thus working out by a sale of the property of the combination or otherwise, a condition of things which would not be repugnant to the prohibitions of the act."

The court, however, in consideration of the public interests and that of innocent participants, determined to send the case back to the Circuit Court, with directions to endeavor to ascertain and determine upon some plan or method of dissolving the combination and working out a lawful condition of things, if that could be done within a period of six months, with a possible extension of two months longer; but that in the event that such condition of disintegration in conformity with the law should not be brought about within that time, it should be the *duty* of the court—

> "either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce or by the appointment of a receiver, to give effect to the requirements of the statute."

Probably no more drastic decree has ever been entered by the Supreme Court than this. The court remits to the Circuit Court the execution of a decree of dissolution of a combination of sixty-seven corporations and twenty-nine individuals, with assets amounting to upwards of $400,000,000 book value, and net earnings exceeding $36,000,000 per annum; which had acquired 77 per cent of the entire business of the United States in manufactured tobacco, plug

and smoking tobacco; 96 per cent of snuff; 77 per cent of cigarettes; 91 per cent of little cigars; and 14 per cent of cigars and stogies; and which has acquired probably the most extensive monopoly of interstate and foreign commerce ever created in the world. This combination was ordered to be resolved into, not necessarily its original elements; but, in effect, to be divided up into a number of separate and distinct integers, no one of which should threaten monopoly, and which should not either by reason of their organization and business, or in their relation to each other, constitute combinations in restraint of interstate or foreign commerce. The Supreme Court not only *empowered,* but *directed* the Circuit Court, in case this lawful condition should not be brought about within a period of six or eight months, to either appoint a receiver of this vast property for the purpose of, by sale or otherwise, working out the ordered disintegration; or by injunction to paralyze and end its conduct of interstate business. Those who have thoughtlessly yielded to the superficial conclusion resulting from the application by the CHIEF JUSTICE of the rule of reason to the interpretation of the Sherman law, can find but little to justify the idea that the Sherman law has been rendered ineffective by those two decisions, for precisely the contrary is clearly established by these great judgments. The most cursory examination of the decree in the Tobacco case,—the most casual consideration of the drastic and far-reaching remedy imposed, makes it perfectly apparent that the Sherman law, perhaps for the first time, has been demonstrated to be an actual, effective weapon to the accomplishment of the purpose for which it was primarily enacted, namely the destruction of the great combinations familiarly known as "trusts."

The main reliance of the defendants in both the *Standard Oil* and the *Tobacco* cases was the decision in *United States* v. *Knight*[26] to the effect that the acquisition of a number of manufacturing plants in one State by a corporation of another State was not within the intent of the Sherman law, even though the purchaser thereby acquired upward of 90 per cent of all the refineries of sugar in the United States, because manufacture alone and not commerce, was involved. The *Knight* case had been distinguished in subsequent cases as not involving any questions of interstate commerce. In the *Standard Oil* case the court dismissed it with scant consideration, saying—

> "The view, however, which the argument takes of that case and the arguments based upon that view have been so re-

[26] 156 U. S. 1.

peatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-Trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice."

The Court cited as illustrative of this point the cases of *United States* v. *Northern Securities Co.*,[27] *Loewe* v. *Lawler*,[28] *United States* v. *Swift & Co.*,[29] *Montague* v. *Lowry*,[30] *Shawnee Compress Co.* v. *Anderson*.[31]

But the decision in the case of *West, Attorney General,* v. *Kansas Natural Gas Company*,[32] goes further in overthrowing the doctrine of the *Knight* case than any of those cited by the CHIEF JUSTICE in the *Standard Oil* case, or than the obvious disregard of its authority in the latter case. In the *Knight* case, the facts presented in the evidence were taken by the court as involving merely the acquisition by one corporation of manufactories wholly within the State and it was held that such acquisition was not within the power of the Congress of the United States to regulate commerce among the States and with foreign countries.

> "Doubtless," said Chief Justice FULLER, "the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not a primary sense * * * Commerce succeeds to manufacture and is not a part of it.
>
> "* * * The regulation of commerce applies to the subject of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities and articles bought, sold, or exchanged for the purpose of such transit among the States, or put in the way of transit may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

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[27] 193 U. S. 334.
[28] 208 U. S. 274.
[29] 196 U. S. 375.
[30] 193 U. S. 38.
[31] 209 U. S. 423.
[32] 221 U. S. 229.

The cases of *Coe* v. *Errol*[33] *and Kidd* v. *Pearson*[34] were cited in support of the proposition that functions of manufacture and commerce were different, that to hold otherwise would be to invest Congress, "to the exclusion of States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry." That contracts, combinations or conspiracies to control domestic enterprise in manufactures, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, the court conceded, but it said that such restraint would be an *indirect* result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy. So it was held in *Kidd* v. *Pearson* that the refusal of a State to allow articles to be manufactured within her borders, even for export, did not directly affect external commerce and did not trench upon the Congressional control over interstate commerce.

In the case of *West, Attorney General,* v. *Kansas Natural Gas Company,*[35] the Supreme Court reviewed decisions of the United States Circuit Court in suits having for their common purpose an attack upon the constitutional validity of a statute of Oklahoma, framed for the purpose of prohibiting the transportation or transmission of natural gas from points within that State to points in other States. This prohibition was sought to be accomplished by various provisions in the statute under review. The statute was held to be prohibitive of interstate commerce in natural gas, and, consequently, a violation of the commerce clause of the Constitution of the United States. Mr. Justice McKENNA, writing the opinion of the court, said that the act presented no embarrassing questions of interpretation—

> "it was manifestly enacted in the confident belief that the State had the power to confine commerce in natural gas between points within the State. * * * And the State having such power, it is contended, if its exercise affects interstate commerce it affects such commerce only incidentally, in other words, affects it only, as it is contended, by the exertion of lawful rights and only because it cannot acquire the means for its exercise."

The results of the contention, the court held, repel its acceptance.

> "Gas, when reduced to possession, is a commodity; it be-

[33] 116 U. S. 517.
[34] 128 U. S. 1.
[35] 221 U. S. 229.

longs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at State lines. And yet we have said that 'in matters of foreign and interstate commerce there are no State lines.' In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court. * * * At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a State, and that it cannot be regulated or restrained by a State, or that a State cannot exclude from its limits a corporation engaged in such commerce."

If, therefore, the State cannot control the transmission of natural gas produced within its borders to other States, because to concede that control would be in effect to empower it to cut off at its source all of the objects of interstate commerce, how can it retain the right to prohibit the manufacture within its limits of commodities intend-

ed to be shipped in interstate commerce? Commodities when so manufactured are precisely like natural gas reduced to the possession of the owner, that is, a commodity which belongs to him as his individual property, is subject to sale by him, and may be the subject of interstate and intrastate commerce. It is true the statute did not deal with the *production* of the gas, and to that extent, possibly, it is not in conflict with *Kidd* v. *Pearson* and *Coe* v. *Errol.* Yet if the constitutional right of Congress to regulate interstate commerce attaches to the commodity the moment it is in existence in the hands of the owner, so that the State may not prohibit its shipment in interstate commerce, does it not apply as well from that moment to prevent the owner from himself, by combination or agreement, imposing an undue restraint upon its shipment in such commerce. What the State is prohibited from doing, the citizen may not do, and the Sherman Act attaches from the moment the commodity comes into existence to prevent any impediment being laid upon its possible passage into the ordinary and usual currents of commerce among the States.

Summing up the results of these late decisions, therefore, it will be seen that the area of uncertainty in the law has been greatly narrowed, and that its scope and effect have been pretty clearly defined; the school of literal interpretation has been repudiated, and the application of a rule of reasonable construction declared. There will be always, of course, a field of uncertainty in so far as an investigation of facts—particularly when intent becomes a necessary consideration—is required. But this much may surely be said to be now beyond controversy:

That ordinary agreements of purchase and sale, of partnership, or of corporate organization, do not violate the first section of the Sherman act, even though incidentally and to a limited degree they may operate to restrain competition in interstate or foreign commerce between the parties to such agreements,

But any contract, combination or association the direct object and effect of which is to control prices, restrict output, divide territory, refrain from competition or exclude or prevent others from competing in any particular field of enterprise, imposes an undue restraint upon trade and commerce and is in violation of the first section of the act. This principle applies to all associations of competitors of the character usually known as pools; to agreements with so-called wholesale or retail agents whereby the manufacturer of an article, even though made according to some secret process or formula seeks to control the price at which it may be sold by purchasers directly or indirectly from the manufacturer. It applies also to attempts to control competition between independent concerns by

means of a stock holding trust, whether individual or corporation holder.

Size alone does not constitute monopoly. The attainment of a dominant position in a business acquired as the result of honest enterprise and normal methods of business development, is not a violation of the law. But unfair methods of trade, by destroying and excluding competitors by means of intercorporate stockholdings, or by means of agreements between actual or potential competitors, whereby the control of commerce among the States or with foreign countries in any particular line of industry is secured or threatened, expose those who are concerned in such efforts to the penalties prescribed in the second section of the act, because they are engaged in monopolizing or attempting to monopolize such commerce.

It is also now settled that no form of corporate organization, merger or consolidation, no species of transfer of title, whether by sale, conveyance or mortgage; and no lapse of time from the date of the original contract, conspiracy or combination, can bar a Federal Court of equity from terminating an unlawful restraint, or compelling the disintegration of a monopolistic combination. The maxim ***nullum tempus occurrit regi*** is applicable to any continuing combination or conspiracy which the Anti-Trust Act of 1890 condemns.

Speaking of the conscious development of institutions in America, Professor WOODROW WILSON in his work on "The State," writes:

> "It is one of the distinguishing characteristics of the English race, whose political habit has been transmitted to us through the sagacious generation by whom this government was erected, that they have never felt themselves bound by the logic of laws, but only by a practical understanding of them based upon slow precedent. For this race, the law under which they live is at any particular time *what it is then understood to be,* and this understanding of it is compounded of the circumstances of the time. Absolute theories of legal consequence they have never cared to follow out to their conclusions. Their laws have always been used as parts of the practical running machinery of their politics—parts to be fitted from time to time, by interpretation, to existing opinion and social condition."

If this law, designed to protect the people of this country from the evils of monopoly, and to preserve the liberty of the individual to trade freely, shall now be clearly understood; if its true purpose shall be recognized and its beneficient consequences realized, the twenty years of slowly developed interpretation and widening precedent

will not have been without great value. For the law will henceforth be used, to employ Dr. WILSON's language, as a part of the running machinery of our political system, adapted to the needs of our social condition.

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